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No. 90-747

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF STATE, PETITIONER

v.

MICHAEL D. RAY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Respondents' brief in opposition is long on vituperation, short on analysis, and devoid of any answer to our submission that the issues presented are of substantial importance to the sound administration of the Freedom of Information Act (FOIA) and to the privacy and national-security interests that FOIA protects. On the Exemption 6 issues, the ruling below conflicts with *Department of Justice* v. *Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), and with decisions of other courts of appeals. And in holding that the government was too late in invoking Exemptions 1 and 7, the court of appeals declined to follow the approach of the D.C. Circuit's en banc decision in *Jordan* v. *Department of Justice*, 591 F.2d 753 (1978). The Court should grant review to resolve these conflicts and differences in approach; to prevent injury to important privacy and national-security interests; and to announce concrete principles to guide decisionmaking in these two areas of FOIA litigation, replacing the ad hoc approach and unchanneled discretion exemplified by the decision below.

1. Respondents' pervasive allegations about State Department "propaganda" and "cover-ups" call only for a brief reply. Respondents requested summaries of interviews of Haitian nationals who had been returned to Haiti after attempting to enter the United States illegally. Far from "covering-up" the summaries, the State Department *released* them, deleting only the names or other information that would identify the interviewees. Those deletions conformed closely to *Department of the Air Force* v. *Rose*, 425 U.S. 352 (1976), where the Air Force submitted the summaries of disciplinary actions for *in camera* review, but deleted information that might identify the cadets involved—a practice this Court described in *Reporters Committee* as "unquestionably appropriate." 489 U.S. at 773. The reasons for the deletions are even stronger here than in *Rose*. Here, the interviewees received a pledge of confidentiality; in addition, the deletions further the national interest in protecting human rights by protecting sources of information on that subject.

Respondents nevertheless accuse (Br. in Opp. 3) the State Department of disseminating "propaganda" that "suggests that political repression in Haiti is nonexistent." See also Br. in Opp. 12-13, 14, 17, 21, 25. The State Department has suggested no such thing. To the contrary, it has repeatedly documented political repression and violence in Haiti.[1] It is precisely because of the history of repression in Haiti that the State Department interviewed returnees to ascertain whether they had been persecuted in retaliation for their attempted departure. The ability of the United States to gather such information, which furthers its ability to monitor and promote human rights in other countries, would be greatly

[1] These practices are documented in the State Department's annual *Country Reports on Human Rights Practices*, which are published as Joint Committee Prints by the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs. See the *Reports* for the years 1985 (at 571-581), 1986 (at 533-540), 1987 (at 510-519), 1988 (at 598-607), and 1989 (at 620-627).

undermined if the government were unable to honor a pledge of confidentiality and protect its sources of information.

Respondents even go so far as to question (Br. in Opp. 6, 20) whether the interviews "were, in fact, ever conducted," or whether the State Department instead "concocted" them to "justify its foreign policy goals" and "circumvent domestic and international refugee law." These wildly unfounded accusations are supported by not a scintilla of evidence suggesting that the interviews never occurred or that the summaries are false; and State Department officials in fact submitted formal declarations in this case, which the courts below obviously credited, explaining that the documents contain summaries of interviews that *were* conducted. See Pet. 2-7.

2. We have explained (Pet. 13-18) that the court of appeals undervalued the privacy interests protected by Exemption 6 in four specific respects. Undaunted, respondents assert (Br. in Opp. 17) that "no facts have been shown or alleged that would lead any reasonable person to conclude that anyone's privacy would be harmed by release of the Haitians' names and addresses." Briefly, our points are these:

First, the summaries contain personal details about many interviewees (marital and employment status, children, living conditions, and efforts to enter the United States) that, under the judgment below, would now be publicly linked with named individuals. As we have noted (Pet. 16), we are aware of no other case in which a court has ordered disclosure of such information. Respondents do not contend otherwise; they simply ignore this serious invasion of privacy.

Second, disclosure of the Haitians' identities would publicly identify them as persons who cooperated with the U.S. investigation. Pet. 15-16. Respondents do not deny that this invasion of privacy will occur, but seek to minimize it under either of two possible views of conditions in Haiti.

On the one hand, respondents argue (Br. in Opp. 17) that if they are correct that "political bloodshed in Haiti is a reality," the interviewees "would have no concern for 'privacy interests,'" but instead "would want their status revealed in the hope that they could return to the United States." Respondents' notion that the Haitian interviewees as a class have "no concern" for privacy interests is speculative, disrespectful of the individuals involved, inconsistent with representations in the State Department declarations about the need for confidentiality, and at odds with the assumptions underlying Exemption 6. It also cannot be reconciled with respondents' basic position in this case: if the returnees have been persecuted, as respondents insist, they presumably would not want their cooperation with the United States to be made public, for fear of further persecution. Accordingly, in asserting that the returnees would nevertheless want their identities disclosed, respondents are arguing not that there are no privacy interests at stake, but rather that those interests are outweighed by the returnees' own need to have the public know who they are. That, however, is an assessment to be made by the individual interviewees, who of course may publicly identify themselves at any time.

On the other hand, respondents claim (Br. in Opp. 17-18) that if the interviewees "live in a land where political repression is non-existent"—a view respondents attribute to the State Department—then "[t]hey certainly would not claim that their 'privacy' had been invaded," since they would not expect retaliation. This reasoning is also flawed. The State Department does not take the position that there is no political repression in Haiti (see page 2, *supra*); and although the interviews did not turn up instances of persecution specifically in response to attempted migration to the United States, the possibility of retaliation (or fear of retaliation) for cooperating with a U.S. investigation of that subject cannot be ruled out. Interviewees might also suffer embarrassment or hostility among family, friends, and fellow

nationals. See Pet. 5-6, 15-16. Respondents' contention that a person suffers no invasion of privacy interests protected by Exemption 6 unless the information disclosed is highly personal or negative was rejected by this Court in *Department of State* v. *Washington Post Co.*, 456 U.S. 595, 600-601 (1982), and by the D.C. Circuit in *National Ass'n of Retired Federal Employees (NARFE)* v. *Horner*, 879 F.2d 873, 875 (1989), cert. denied, 110 S. Ct. 1805 (1990), and *FLRA* v. *Department of the Treasury*, 884 F.2d 1446, 1451-1452 (1989), certs. denied, 110 S. Ct. 863 and 864 (1990). See also *Ripskis* v. *HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (disclosure of favorable performance evaluation constitutes unwarranted invasion of privacy).

Third, the court of appeals "candidly acknowledge[d]" that respondents intend to track down and question the interviewees in Haiti, Pet. App. 7a, which would invade the distinct privacy interest encompassed by "the right to be let alone." *Olmstead* v. *United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). The court of appeals cited that prospect in concluding that "there are significant privacy interests at stake here," Pet. App. 8a, and other courts of appeals have reached a similar conclusion. See Pet. 17 n.9. Yet, respondents do not even mention the point.

Fourth, the privacy interests are greatly enhanced in this case by the fact that the interviewees were assured that their cooperation would be kept confidential. Pet. 13-15.[2] Respondents attempt (Br. in Opp. 19) to minimize this fact by quoting the observation in *Washington Post Co.* v. *HHS*, 690 F.2d 252, 263 (D.C. Cir. 1982), that "to allow the government to make documents exempt by the simple means of promising confidentiality would subvert FOIA's disclosure mandate." But re-

[2] Respondents question (Br. in Opp. 18, 19, 21 & n.20) whether there was any such understanding. As they concede (Br. in Opp. 21 n.20), however, the declarations of two State Department officials represented that there was (see Pet. 3, 5), and both courts below concluded that the interviewees had been "promised" confidentiality. Pet. App. 7a, 28a.

spondents ignore the framework the D.C. Circuit prescribed for taking such a promise into account under Exemption 6. *Washington Post* made clear that "a government pledge of confidentiality, made in good faith and consistently honored, should generally be given weight on the privacy side of the scale," because it enhances the expectation of privacy. *Ibid.* And its holding was that "such a pledge should not be given determinative weight where the public interest in disclosure is high and the privacy interest in the information would otherwise be low." *Ibid.* It follows that in the converse situation presented here, where the public interest in disclosure is not great (see pages 6-7, *infra*) and the privacy interest in the information is independently very high, the pledge *should* be given determinative weight. Although the court below cited *Washington Post* for the proposition that a pledge of confidentiality does not "compel" withholding, Pet. App. 7a-8a, it declined to follow that decision's analytical framework.

b. On the public interest side of the Exemption 6 balance, respondents, like the court of appeals (Pet. App. 9a), do not dispute our submission (Pet. 19, 20-21) that disclosure of the Haitians' identities "would tell us nothing *directly*" about "the conduct of the *Department of [State]*." *Reporters Committee*, 489 U.S. at 774 (first emphasis added). That should be the end of the matter. The only relevant public interest under Exemption 6 is that of enabling the people to know "what their government is up to." *Reporters Committee*, 489 U.S. at 772-773 (Italics omitted).

As we have explained (Pet. 20-22), the court of appeals' novel derivative-use rationale for disclosure—that the requisite public interest is present because respondents plan to question the interviewees in order to assess the State Department's monitoring of Haiti's human rights record—is pure bootstrap. If accepted, it would eviscerate the protection afforded by Exemption 6. It apparently would, for example, require disclosure of a wide range of personal information that heretofore has universally been regarded as protected (such as the

cadets' names in *Rose*) whenever the requester asserts that he plans to use the information to investigate the governmental program—or, as in this case, whenever the requester alleges that documents already released to the public in redacted form are false. Respondents do not deny that this is the import of the decision below or refute our submission that the court of appeals' reasoning is incompatible with *Rose* and *Reporters Committee*. Respondents are content to rest once again (Br. in Opp. 18) on the court of appeals' erroneous finding of a public interest in their desire "to learn whether our government is honest to the public about Haiti's treatment of returnees." See Br. in Opp. 25. That will not do.

c. Review is warranted because, as we have explained (Pet. 22-24), the Exemption 6 holding below conflicts not only with this Court's decisions in *Rose* and *Reporters Committee*, but also with decisions of other courts of appeals. Respondents attempt (Br. in Opp. 19-20) to distinguish the D.C. Circuit's decision in *NARFE*, which sustained the withholding of the names and addresses of retired federal employees, on the grounds that disclosure would have led to commercial solicitations, and that the D.C. Circuit found no public interest in disclosure while here the Eleventh Circuit found a "strong public interest." Respondents ignore the actual holdings in *NARFE*.

The D.C. Circuit first held that release of the names and addresses would invade the individuals' privacy in two ways: it would disclose the defining characteristics of the people on the list, and it would lead, through solicitations, to interference with "the subjects' reasonable expectations of undisturbed enjoyment in the solitude and seclusion of their own homes." 879 F.2d at 876. Similarly here, disclosure would link the interviewees to the defining characteristics of the summaries (cooperation with a confidential U.S. investigation), and respondents' plans to track down and interrogate the interviewees would interfere with their quiet enjoyment of home and

hearth. On the other side of the balance, the D.C. Circuit held that there was no public interest under Exemption 6 in releasing the names to enable NARFE to further its lobbying efforts or inform the public about where annuity payments are going, because neither consequence would tell the public directly what the government is up to. *Id.* at 879. As the court below conceded, release of the Haitians' names likewise would tell the public nothing directly about what the State Department is up to. Pet. App. 9a. Accordingly, contrary to respondents' contention, if the court of appeals in this case had followed *NARFE*, it would have been compelled to sustain the withholding.

Respondents also dispute our submission (Pet. 17-18, 23) that the decision below conflicts with *Heights Community Congress* v. *Veterans Administration*, 732 F.2d 526, 530 (6th Cir.), cert. denied, 469 U.S. 1034 (1984). The central holding of *Heights Community Congress* is that disclosure of names and addresses to permit the requester to conduct face-to-face interviews is antithetical to the privacy interests protected by Exemption 6. 732 F.2d at 530. That holding cannot be reconciled with the decision below. Respondents assert that the Sixth Circuit found that the requested information "was available from 'other less controversial avenues to obtain the desired information.'" Br. in Opp. 20 (quoting 732 F.2d at 530). To be sure, the Sixth Circuit did observe: "Certainly nothing prevents [the requester] from publicly advertising its investigation and requesting any VA loan recipient who desires to cooperate * * * to come forward if he so elects, or pursuing other less controversial avenues to obtain the desired information." *Ibid.* But the court did not say in the last phrase, on which respondents rely, that there *were* such alternatives (much less rest its holding on that premise); it said only that the requester was free to pursue whatever alternatives there were. In any event, like the requester in *Heights Community Congress*, respondents are not precluded from "publicly advertising [their] investigation" and requesting any Haitian interviewee to cooperate "if he so elects." Thus, respondents' attempt to explain away the square conflict with *Heights Community Congress* is unavailing.

3. The court of appeals also erred in refusing to entertain, as untimely, the State Department's submission that the identities of the Haitian nationals are protected by Exemptions 1 and 7. The D.C. Circuit in *Jordan* identified relevant factors in deciding whether an appellate court may reach the merits of a FOIA claim that (unlike those at issue here) was never even raised in the district court: whether the failure to invoke the exemption was due to "pure mistake," whether the "value of the material" is "obviously high, *e.g.*, confidential information compromising the nation's foreign relations or national security," and whether it appears "highly likely" that the material is covered by the exemption. 591 F.2d at 780.

Respondents do not seriously dispute that the last two of the *Jordan* factors are satisfied (see Pet. 25-26), since they do not deny that disclosure of the identities of foreign nationals who furnish information about their government on a confidential basis will cause valuable sources of information to dry up, or that it is highly likely that the identities of the interviewees therefore are covered by the protection for confidential sources under Exemption 1 (incorporating Exec. Order No. 12,356, §§ 1.3(a)(5) and (9), 1.3(b)) and Exemption 7(D).[3] Pet. 27. Respondents do assert (Br. in Opp. 23) that the government made a "deliberate tactical choice" to wait to classify the documents until after the district court rejected the State Department's Exemption 6 claim. Re-

[3] Although respondents do not mount a particularized challenge to the facial validity of the classification, they allege (Br. in Opp. 13-16) that the State Department classified the names of the interviewees for an improper purpose—apparently, in their view, to cover up evidence of political persecution in Haiti. As we have explained (see pages 2-3, *supra*), however, there is no support for that allegation, and respondents cite none. An invocation of Exemption 1 that is otherwise proper under *Jordan* should not be rejected out of hand on the basis of such unsubstantiated allegations.

spondents do not and cannot cite any support for this assertion, and the record refutes it. As we have explained (Pet. 5-6, 26, 28), State Department personnel who first reviewed the documents did not appreciate the broader foreign-policy interests at stake. However, the materials were promptly classified when, after the district court rejected the State Department's Exemption 6 claim, the impending disclosure was brought to the attention of a high-level State Department official, who recognized the adverse impact on the Nation's foreign policy. Thus, the uncontradicted record establishes that the State Department's failure to classify and invoke Exemption 1 at an earlier time resulted from a "pure mistake." [4] The court of appeals' refusal to entertain the government's Exemption 1 and 7 claims therefore warrants review along with the Exemption 6 issues in this case.

For the foregoing reasons and those stated in the petition, we respectfully submit that the petition for a writ of certiorari should be granted.

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[4] Quoting selected portions of a colloquy during the district court hearing on the government's motion to reconsider based on Exemption 1, respondents contend (Br. in Opp. 8-9) that the Justice Department attorney agreed that "there was no mistake in failing to classify the documents" the first time around. This contention is disingenuous. It is apparent from the colloquy as a whole that the Justice Department attorney was merely assuring the district court that the government was not accusing the *court* of having made a mistake in failing to sustain the withholding under Exemption 1, since the government had not previously relied on that Exemption. 4/12/89 Tr. 3-5.

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